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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-465

JERSEY CENTRAL POWER & LIGHT CO.,

Cross-Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309 AND 1314, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; OFFICE OF FEDERAL CONTRACT COMPLIANCE; GENERAL SERVICES ADMINISTRATION; NEW JERSEY DIVISION OF CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY,

Respondents.

Cross-Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

REPLY BRIEF OF CROSS-PETITIONER, JERSEY CENTRAL POWER & LIGHT CO.

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IN THE

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The Equal Employment Opportunity Commission ("EEOC") urges that the cross-petition filed by Jersey Central Power & Light Co. (the "company") be denied as untimely filed. It seeks to distinguish the treatment in

Pierson v. *Ray*, 386 U.S. 547, on the ground that no claim of jurisdictional defect was raised in that case. Obviously, jurisdictional defects are not cured by a party's failure to assert the deficiency. Thus, *Pierson* cannot be distinguished on that basis.

The EEOC also argues against discretionary consideration of the cross-petition on the ground that the company had ample time in which to raise its claim of estoppel and not only failed to do so in timely fashion, but implied to the District Court that the remand contemplated unlimited examination of the seniority system's bona fide character. The EEOC reprints portions of the company's letter to the District Court (pages 5-6 of its brief) which do not present a complete picture. We think it essential to place these excerpts in perspective.

By order dated February 3, 1975, the District Court posed a series of questions, framed in light of the January 30, 1975 remand, and asked the parties for assistance by responding ". . . if only in preliminary or tentative form subject to later revision, refinement or withdrawal". In one of its questions the court expressed concern that the Court of Appeals' decision did not extinguish all possible Title VII claims which individual employees might assert, and wondered if this fact precluded the entry of any form of declaratory relief. By letter dated February 7, 1975 the company submitted what were called "tentative" responses, one of which was a rather lengthy answer to the question above. That answer was addressed to the propriety of granting relief notwithstanding the possibility of subsequent Title VII actions by those not parties to this litigation. The EEOC has reprinted only a portion of that answer. (At the bottom of page 5).[1]

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[1] A complete statement of the question and answer appears in Appendix A.

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In a second question by the court, it observed that the controversy had arisen from contractual claims, but had been disposed of largely in terms of a Title VII rationale; it wondered if further proceedings would be limited to the scope of Title VII. A portion of the company's response is set forth by the EEOC. (At the top of page 6).[2] The point of the question, obviously, was whether or not any party now regarded as valid the contract theories previously espoused (and deemed controlling by the District Court). The company's answer simply summarized the essentials of the remand, thereby obliquely indicating that contract principles were inapplicable.

What the EEOC fails to recite is the court's question regarding how far back in time proffered evidence may reach. To that, the company responded: "Such inquiry ought not to involve events prior to the commencement date of the EEOC agreement."[3] This response and statement of position cast an entirely different light on those out-of-context excerpts now relied on by the EEOC as showing company awareness and acceptance of an open-ended inquiry of the seniority system's bona fides. The company's position regarding the effect of the conciliation agreement has not changed. The EEOC, however, has adopted a new theory of the case.

The EEOC now asserts for the first time that the seniority system is *per se* not bona fide:

> "It is our position that, whatever may be the situation with respect to pre-1965 discrimination, a seniority system which perpetuates post-1965 un-

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[2] A complete statement of the question and answer appears in Appendix B.

[3] A complete statement of the question and answer appears in Appendix C.

> lawful discrimination cannot, by its very nature, be deemed bona fide." (EEOC petition, page 12)

This was not the position of the EEOC when it petitioned the Court of Appeals for rehearing. At that time it said: "At issue here is not the seniority system *per se* but the use of that system to determine who is to be laid off." (Its brief, page 13). It sought not to invalidate the seniority system nor to unduly disrupt its operation; rather it sought to preserve the minority ratios achieved under the conciliation agreement (Id. page 14).

Finally, the EEOC argues that the cross-petition's reliance on estoppel is to no avail because the conciliation agreement did not encompass the question of layoffs. It cites the District Court's holding to that effect which seems rather surprising in view of the contrary holding of the Court of Appeals.

For the reasons submitted, the company requests that its cross-petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

On February 3, 1975 the District Court submitted a Memorandum and Order to all counsel. It read in part as follows:

> "The majority and concurring opinions of the United States Court of Appeals for the Third Circuit, filed January 30, 1975, have been received. The ruling calls for a remand to this court with directions:
>
> 1. to vacate so much of the September 23, 1974 order as is inconsistent with the majority opinion; and
>
> 2. to conduct such further proceedings, not inconsistent with the majority opinion, as may thereafter be required.
>
> So that the court may have the assistance of the parties in executing its duty on remand, each and all of them are requested to submit their views on the questions that are listed in this memorandum. Responses should be in the hands of the court on or before February 10, 1975, if only in preliminary or tentative form subject to later revision, refinement or withdrawal.
>
> . . .
>
> D. At the hearing here, the court raised the question whether the Local Unions, who are the recognized agents for *all* employees within the bargaining units, could properly take the adversary position that all layoffs are to be in strict accordance with the seniority clause, or whether it should ar-

> range to establish two committees of its members, one to represent the class of female and minority members and the other to represent the class of all other members, with the Local Unions providing the funds to meet the litigation expenses for the two groups. While the opinions of the Court of Appeals do not address this question explicitly, the majority opinion notes that the decision 'can obviously "affect and bind only the parties present in this litigation' (Majority Slip Opinion, p. 34), while the concurring opinion notes that even after final determination on remand here, 'other parties, such as employees affected by the current layoffs, are not foreclosed from bringing actions under Title VII or alternative statutes . . .' (Concurring Slip Opinion, page 1, footnote 1). Is this circumstance one that ought to result in a denial of any declaratory relief for inability to completely terminate the controversy in the absence of such other parties?"

In answer to the court's order, the company replied by letter dated February 7, 1975. Its response to the above question follows:

> "The Company submits the following tentative responses to the questions contained in the District Court's Memorandum and Order of February 3, 1975.
>
> . . .
>
> "D. The Court of Appeals has determined that the matter before it presents a justiciable controversy (Page 2, Footnote 5 and Page 16, majority opinion), that the requisite jurisdiction exists (Pages 14-

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16) and that the matter has sufficiently matured to permit a judicial determination (Pages 16-17). Neither the District Court in its September 23rd opinion nor the Court of Appeals was troubled by the absence, as parties, of others possibly affected by the layoff. The Court of Appeals specifically states that its decision can affect and bind only present parties (Page 34), and we detect no implication therein that the possible existence of other parties (which that Court obviously realized) would preclude a termination of the controversy as to present parties. It appears implicit that both the trial and appellate courts were satisfied that all necessary parties had been joined for purposes of determining the controversy presented. Otherwise, Rule 19(a), F. R. Civ. P., would have been properly invoked just as the District Court did invoke that rule to retain GSA and OFCC as necessary parties. Furthermore, the Court of Appeals specifically recognized the possibility of a subsequent action by an aggrieved party, citing *Alexander* v. *Gardner-Denver Co.* (Page 34), yet nothing in its conclusion or order suggests that the granting of the declaratory relief sought is inconsistent with that possibility.

The Court's remand allows the parties the opportunity, if desired, to offer evidence on the *bona fide* character of the company-wide seniority system. Irrespective of whether such evidence is presented or not, entry of partial summary judgment at this time is appropriate. I.e., absent evidence demonstrating that the seniority system is not bona fide, the seniority provisions of the collective bargaining agreement here involved shall be followed in the event of layoffs."

APPENDIX B

A second question posed by the District Court was as follows:

> "E. The determination here was grounded on the circumstance that the controversy arose out of two separate contractual undertakings, and that in the absence of any rule forbidding it, parties to a contract may obligate themselves to undertakings above and beyond those required by statute. While the opinions of the Court of Appeals recognize that the issues here arise from contractual obligations, much of its rationale is grounded on an analysis and interpretation of the statutory requirements of Title VII. Is it the view of the parties that any further proceedings here will be limited to the scope of Title VII?"

The company replied:

> "E. As we understand the remand order and its explanation, the first stage of the evidentiary process would be considerably more narrow than the scope of Title VII. The inquiry would focus only on (1) the terms of the seniority provisions, i.e., is it facially neutral, and (2) evidence relevant to the question of intent to disguise the seniority system as a discriminatory device. Evidence of disparate impact resulting because of prior discriminatory practices, typical evidence in Title VII cases, would not be admissable, or at least would not be probative according to the Court of Appeals (Pages 27-29). A finding that the system is not bona fide would not support a Title VII violation or remedy: it would simply open up a broader inquiry which is

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then within the scope of Title VII and limited thereto. A finding that the seniority system is *bona fide* would be conclusive and close out any further Title VII considerations."

APPENDIX C

A third question posed by the District Court was as follows:

> "H. In the context of item G,[1] how far back in time or history may any proffered evidence reach, in view of the facts that seniority status at any date rests on the then current collective bargaining agreement and that such agreements are usually of limited duration?"

The company replied:

> "H. Such inquiry ought not to involve events prior to the commencement date of the EEOC agreement."

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[1] "G. If any party contemplates the presentation of evidence that the seniority system violates Title VII, such as to permit it to be modified judicially as a remedy, what offers of proof *may* be made within the limits set out (Majority Slip Opinion, pp. 28-30, and especially footnote 54), and from among those that *may* be offered, what specific offers of proof *are* intended to be made?" (Emphasis in original).